

TB 13-193 AB  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
DeSEAN ALLEN,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
TOWN OF BABYLON, TOWN OF ISLIP, COUNTY OF  
SUFFOLK, and LONG ISLAND RAILROAD,

Defendants.  
-----X

**Docket No.:**  
**13CV3106**

**ANSWER WITH**  
**AFFIRMATIVE**  
**DEFENSES AND**  
**CROSS CLAIMS**

Defendant, TOWN OF BABYLON, by its attorneys, BRODY, O'CONNOR & O'CONNOR, ESQS., by AISHA K. BROSNAN, ESQ., answering the Complaint of the plaintiff herein, respectfully shows to this Court and alleges as follows:

**ANSWERING THE FIRST CAUSE OF ACTION AGAINST**  
**DEFENDANT, TOWN OF BABYLON**

1. Upon information and belief, denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs numbered "1", "2", "3", "4", "5", "10", "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", "21", "25", "29", "30", and "31" of the Complaint herein and respectfully refers all questions of law to this Honorable Court.

2. Denies the allegations contained in paragraphs numbered "6", "7", "8", "9", "22", "26", "28", "33", "34", "35", "36", "37", "38", and "39" of the Verified Complaint herein except admits that defendant, Town of Babylon, is a municipal corporation, duly organized and existing by virtue of the laws of the State of New York.

3. Denies the allegations contained in paragraph numbered “27” of the Complaint herein, except admits that the defendant, TOWN OF BABYLON, was served with a purported Notice of Claim.

4. Denies the allegations contained in paragraphs numbered “23”, “24”, and “32” of the Complaint herein, and respectfully refers all questions of law to this Honorable Court.

**AS AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF’S COMPLAINT HEREIN  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

5. That if the plaintiff was caused to sustain damages at the time and place set forth in plaintiff’s Verified Complaint, such injuries and/or damages were sustained by said plaintiff in whole or in part by reason of the carelessness, recklessness, negligence and or negligent act of omission or commission of the culpable conduct of said plaintiff and defendant pleads such culpable conduct and acts of negligence in diminution of damages.

**AS AND FOR A SECOND, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF’S VERIFIED COMPLAINT HEREIN,  
DEFENDANT TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

6. Any recovery or verdict against the answering defendant must be reduced by virtue of the failure of the plaintiff to exercise due care to avoid, eliminate and/or mitigate the injury and/or damages allegedly sustained.

**AS AND FOR A THIRD, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFFS' VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

7. That if the plaintiff recovers herein against two or more tort-feasors jointly liable and/or if the culpable conduct of any person not a party to this action is considered in determining any equitable share herein and if this answering defendant's liability is 50 percent or less of the total liability assigned, then this answering defendant's liability for non economic loss shall not exceed the equitable share as determined by this answering defendant's percentage of liability for non economic loss pursuant to Civil Practice Law and Rules Article 16.

**AS AND FOR A FOURTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

8. This action is barred by the provisions of Sections 158-1 and/or 158-2 of the Code of the Town of Babylon which requires prior written notice of street and sidewalk defects.

**AS AND FOR A FIFTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

9. This action is barred since the Town of Babylon did not have notice of the alleged condition as required by Town Law Section 65(a) which requires prior written notice of street or sidewalk defects.

**AS AND FOR A SIXTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

10. In the event plaintiff recovers a verdict or judgment against the answering defendant, then said verdict or judgment must be reduced pursuant to CPLR 4545 by those amounts which have been or will, with reasonable certainty, be paid on behalf of or indemnify plaintiff in whole or in part, for any past or future claimed economic loss, from any collateral source including but not limited to no-fault, insurance, social security, workers' compensation or employee benefit programs.

**AS AND FOR A SEVENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

11. That the accident, injuries and damages alleged by the plaintiff in the Verified Complaint were caused solely or contributed by plaintiff's assumption of the risk.

**AS AND FOR AN EIGHTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

12. That the answering defendant, Town of Babylon, does not own, maintain, supervise, inspect nor control the location where it is alleged plaintiff's accident occurred, nor is it under a duty to maintain, repair, supervise, inspect or control said location.



**AS AND FOR A NINTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

13. That all the risks and dangers connected with the situation at the time and place mentioned in the plaintiff's Verified Complaint were open, obvious and apparent, and were known to and assumed by the plaintiff herein.

**AS AND FOR A TENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

14. That all the risks and dangers connected with the situation at the time and place mentioned in the plaintiff's Verified Complaint were trivial in nature and not inherently dangerous.

**AS AND FOR A ELEVENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

15. The alleged acts of this answering defendant did not proximately cause the alleged damages of the plaintiff.

**AS AND FOR AN TWELFTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

16. That if the plaintiff has or does receive sums of money in settlement of the claims asserted herein, by reason thereof, the defendant, Town of Babylon, is entitled to the protection, provisions and limitations of Section 15-108 of the General Obligations Law of the State of New York in reducing the claim of the plaintiff against the defendant, Town of Babylon, by the amount stipulated in the Release, the amount of consideration paid for it or

the amount of the released defendant's equitable share for the damages, whichever is the greatest.

**AS AND FOR A THIRTEENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

17. This action is barred as against the Town of Babylon by virtue of the provisions contained in Chapter 191-16 of the Code of the Town of Babylon, which requires that an abutting property owner shall keep the sidewalk in front of or abutting the lot, house or building in good and safe repair and shall maintain and repair the sidewalk adjoining the property and that said property owner shall be liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition.

**AS AND FOR A FOURTEENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

18. The Verified Complaint fails to state a cause of action against the Town of Babylon for failure by plaintiff to allege in her Verified Complaint compliance with Sections 158-1 and/or 158-2 of the Code of the Town of Babylon and Town Law §65(a).

**AS AND FOR A FIFTEENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

19. This action is barred as against the Town of Babylon by virtue of Plaintiff's failure to name necessary and indispensable parties to this action.

**AS AND FOR A SIXTEENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

20. That the Complaint must be dismissed as the purported Notice of Claim was vague and not proper or sufficient in form, content, substance and/or method or manner of service as required by the General Municipal Law.

**AS AND FOR A SEVENTEENTH, SEPARATE AND COMPLETE DEFENSE  
TO THE PLAINTIFF'S VERIFIED COMPLAINT HEREIN,  
DEFENDANT, TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

21. Plaintiff cannot prosecute this action due to their failure to comply with Sections 50-e, 50-h and 50-i of the General Municipal Law.

**AS AND FOR A CROSS CLAIM AGAINST THE DEFENDANTS,  
METROPOLITAN TRANSPORTATION AUTHORITY, TOWN OF ISLIP,  
COUNTY OF SUFFOLK, and LONG ISLAND RAILROAD,  
DEFENDANT TOWN OF BABYLON, ALLEGES UPON  
INFORMATION AND BELIEF AS FOLLOWS:**

22. That if the plaintiff sustained the damages alleged in the Verified Complaint, which damages this answering defendant denies, such damages were the result of Co-Defendants negligence by virtue of the provisions contained in Chapter 191-16 of the Code of the Town of Babylon, which requires that an abutting property owner shall keep the sidewalk in front of or abutting the lot, house or building in good and safe repair and shall maintain and repair the sidewalk adjoining the property and that said property owner shall be liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition.



23. That if the plaintiff sustained the damages alleged in the Verified Complaint through any negligence and/or breach of warranty other than her own, such damages were caused by and resulted from the negligence and/or breach of warranty of the above-named co-defendant.

24. That if the plaintiff recovers a verdict against this answering defendant for the damages alleged in the Verified Complaint, such liability will have been caused by the negligence and/or breach of warranty of the above-named co-defendant.

25. That by reason of the foregoing, if any verdict or judgment is rendered in favor of the plaintiffs against this answering defendant, then the above named co-defendant will be liable to this answering defendant in whole or in part, for said verdict and for costs and expenses incurred by the said answering defendant in the defense of this action.

**PLEASE TAKE NOTICE** demand is hereby made that you interpose an answer to the cross-claim.

**WHEREFORE**, the answering defendant demands judgment dismissing the Verified Complaint herein as to the answering defendant with costs and further demands that the ultimate rights of the answering defendant, the co-defendants and plaintiff, as between themselves be determined in this action, and that the answering defendant has judgment over and against the above named co-defendants in whole or in part of any verdict or judgment rendered against this answering defendant, together with the costs and disbursements of this action, and the attorneys fees and expenses incurred herein, together with such other and further relief as to this Court may seem just and proper.

Dated: Northport, New York  
June 13, 2013



Yours, etc.

BRODY, O'CONNOR & O'CONNOR, ESQS.  
Attorneys for Defendant  
TOWN OF BABYLON

By:



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METROPOLITAN TRANSPORTATION AUTHORITY  
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New York, New York 10017

COUNTY OF SUFFOLK  
Defendant – Pro Se  
H. Lee Dennison Building  
100 Veterans Memorial Highway  
Hauppauge, New York 11788

LONG ISLAND RAILROAD  
Defendant – Pro Se  
Jamaica Station  
Jamaica, New York 11435

**AFFIDAVIT OF MAILING**

STATE OF NEW YORK     )  
                                      ) ss:  
COUNTY OF SUFFOLK    )

DEBRA SANACORA, being duly sworn, deposes and says:

That your deponent is not a party to this action, is over 18 years of age and resides at Ronkonkoma, New York.

That on the 18 day of June, 2013, deponent served the within ANSWER

UPON:

\*\*\*SEE ATTACHED RIDER\*\*\*

The address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

  
DEBRA SANACORA

Sworn to before me this 18<sup>th</sup> day of June, 2013.

  
NOTARY PUBLIC

NISHA K. BROSNAN  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02BR6111479  
Qualified in Suffolk County  
My Commission Expires September 10, 2016

**RIDER**

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